

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EMMA C. TOVAR)	
Claimant)	
VS.)	
)	
IBP, INC.)	Docket No. 138,596
Respondent)	
Self-Insured)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant requested Appeals Board review of then Assistant Director Brad E. Avery's May 12, 1998, Award. The Appeals Board heard oral argument on December 15, 1998. Stacy Parkinson was appointed Appeals Board Member Pro Tem to serve in place of Appeals Board Member Gary M. Korte who recused himself from this proceeding.

APPEARANCES

Claimant appeared by her attorney, David O. Alegria of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Gregory D. Worth of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Gary L. Jordan of Ottawa, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Assistant Director awarded claimant a 21.33 percent permanent partial general disability limited to her permanent functional impairment, found claimant's average weekly wage should be based on a five-day work week, and denied claimant's request for additional weeks of temporary total disability benefits.

Claimant appealed and contends she is entitled to permanent partial general disability benefits based on a much larger work disability, her average weekly wage should be based on six days per week, and that she was temporally and totally disabled for an additional 8.85 weeks.

Respondent, on the other hand, contends the Appeals Board should affirm the Award in regard to all the issues between the respondent and the claimant. At oral argument, however, the respondent requested Appeals Board review of Assistant Director's denial of respondent request to shift 50 to 60 percent of the liability of the Award to the Kansas Workers Compensation Fund (Fund).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds the Award should be affirmed.

Claimant was denied an award of work disability on the basis that the policy considerations, as announced in Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), applied to the facts of this case. The respondent terminated claimant for failing to report to work. Claimant argues the termination was unreasonable because she returned to work on July 26, 1991, instead of August 26, 1991, as contended by the respondent.

Claimant testified she was in Mexico visiting her sick mother and as soon as she was notified by her attorney she returned to work. However, the record established that her attorney was notified as early as June 17, 1991, that respondent had a job for claimant within her permanent restrictions and she should return to such job on July 1, 1991. Additionally, the record established that claimant was not in Mexico as early as July 10, 1991. The medical records of claimant's treating physician, Dr. Wertzberger, establish he saw claimant on that date. At that time, Dr. Wertzberger notified claimant the respondent had a job available for her within her restrictions and she was to return to work.

The record as a whole supports the conclusion that claimant, without a reasonable explanation, did not return to work for the respondent until August 26, 1991, and was then terminated for failing to report to work. Therefore, the Appeals Board agrees with the Assistant Director's conclusion that the delay of claimant reporting to work was tantamount

to refusing to work and a comparable wage should be imputed to the claimant limiting her to an award based on permanent functional impairment.

In regard to all the issues raised by the claimant and the Fund liability issue raised by the respondent, the Appeals Board agrees with the Assistant Director's analysis of the evidence as set forth in the Award. The Appeals Board finds the Assistant Director's Award sets out findings of fact and conclusions that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this Order. Therefore, the Appeals Board adopts the Assistant Director's findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that then Assistant Director Brad E. Avery's May 12, 1998, Award should be, and is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David O. Alegria, Topeka, KS
Gregory D. Worth, Lenexa, KS
Gary L. Jordan, Ottawa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director